United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1026

B P/S

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

IRVING HAIMSON,

Appellant.

On Appeal From The United States District Court For The Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT

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BRIEF FOR DEFENDANT-APPELLANT

PRELIMINARY STATEMENT

The defendant, Irving Haimson, appeals from a judgment dated and filed December 17, 1976 in the United States District Court for the Eastern District of New York, George C. Pratt, D.J., convicting him after a plea of guilty under a superseding information of violating Title 18, U.S.C., Section 371 (conspiracy to possess merchandise stolen in interstate commerce), and sentencing him to a jail term, probation and a fine (A-19).[1]

The appellant by this appeal seeks a review of the order of District Judge George C. Pratt dated and filed August 26, 1976 in said Court denying his motion to suppress certain evidence

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1. All references are to the appellant's Appendix, unless otherwise stated.

made on constitutional grounds (A-9). The memorandum in support of said decision has not been reported.

The right to have said order reviewed on appeal from the judgment was specifically preserved to the appellant, as appears from the minutes of the hearing when his plea of guilty was entered (148-151) as well as from the minutes of the hearing when judgment was imposed and sentence pronounced (152-154). United States v. Burke, 517 F.2d 377 (2 Cir. 1975); United States v. Rothberg, 480 F.2d 534 (2 Cir. 1973), cert. den. 414 U.S. 856 (1973).

STATEMENT OF THE ISSUES PRESENTED

1. The trial court having found as a fact that the F.B.I. agents had time to obtain a search warrant -- there being no exigent circumstances -- was it the constitutional duty of the government agents to seek such a warrant under the Fourth Amendment before entering the building where the search and seizure took place, notwithstanding the claim by one agent that some of the cartons sought were visible from the street, and especially where the other agent said they had to open a door first?

2. Where the sole witnesses were two government agents, one of whom testified that they opened a door of the private building and peered in and then saw the merchandise being sought, while the other testified that he saw it from the street through an open truck bay, and the trial judge said there was no contradictory

testimony, was not that clearly erroneous as a finding?

3. (A) May resort be had routinely to "consent searches" without violating the Fourth Amendment?

(B) There having been no consent given to enter and search prior to the initial intrusion by the F.B.I. agents into the private building, was not the consent obtained subsequently to make a further search and were not any statements made tainted by the initial illegal entry?

(C) Was not the consent obtained as a result of coercion under the circumstances as shown by the testimony?

STATEMENT OF THE CASE

Under the indictment originally filed the defendant was charged with receiving and possessing approximately 633 cartons of shoes stolen while moving as part of an interstate shipment (Title 18, U.S.C., Section 659) (A-3). The defendant moved to suppress evidence thereof seized by Federal Bureau of Investigation agents without a warrant at a trucking-warehouse concern operated by the defendant and occupying certain premises in Queens, New York (A-4 to A-8). A hearing was held before Judge Pratt on August 6, 1976 (1 to 147), following which the order was made on August 26, 1976 denying the said motion (A-9 to A-16). The superseding information above mentioned was thereafter filed (A-17) to which the defendant pleaded guilty. The above indictment was dismissed. The judgment of conviction, supra, (A-19) followed, from which the appeal was taken by notice

of appeal filed December 20, 1976 (A-21).

The denial of the suppression motion is sought to be reviewed since it set the stage for the events which led to the judgment of conviction.

The sole witnesses at the suppression hearing were two Federal Bureau of Investigation agents called by the Government, Patrick F. Colgan, Jr. and Donald E. Dowd.[2]

On February 13, 1975, a truck carrying 633 cartons of Dunham shoes was hijacked in Brooklyn, New York by persons unknown while it was en route from Brooklyn to Brattleboro, Vermont (5-6).

The Federal Bureau of Investigation was called into the matter and one of its agents, Mr. Colgan, received some confidential information on February 17, 1975 from an undisclosed informant advising him that the stolen merchandise was located in a building in the vicinity of Van Wyck Expressway and Atlantic Avenue, Queens, New York (7) within two blocks of said intersection (10). (There was no testimony to show that the informant was a reliable source of information prior to that time nor that he (or she) had been personally involved in the crime or had personal knowledge of the facts.)

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2. There were 11 photographs introduced as exhibits by the Government (1A to 1K). The photographs are not reproduced in the Appendix because the writer was informed by a printing company that does color reproduction that since they are in color and have dark backgrounds, copies would show less than the originals. They are on file in this Court's Second Supplemental Record. A bulky carton, Gov't. Exhibit 2, was not filed.

Prior to February 17, 1975 F.B.I. Agent Colgan had gathered information concerning the ownership of the shoes and the markings and numbering on the cartons and that there were 633 cartons missing (12-13, 5).

On February 18, 1975, Agent Colgan went to the above vicinity and made a check of buildings in the area to the west and also to the east of Van Wyck. He said he was not successful (7-8).

On February 19, 1975, Mr. Colgan and a team of eight to ten agents continued the search in the same area making "consent searches" in a number of buildings (8-9). Then Mr. Colgan decided to investigate again the area to the east of Van Wyck (9-10). Among likely buildings was one he found located at 139-11 - 95th Avenue, situated on the north side of 95th Avenue (11, 67). He testified that in the afternoon of the day before he had walked from east to west on the sidewalk, reached a point in front of the open bay door of the building, claimed that the sun was very bright in his eyes, looked to his right (where the sun was not in his eyes (70-71)), saw a bay for trucks (but no trucks), and a person in a lighted area in the building, but said he was unaware of the presence of the cartons, and kept on walking (12, 20-21). Notwithstanding his specific purpose of investigating at each likely building to discover the presence of the stolen cartons (61-62), he said, "I didn't really look at all," (21) and that he spent just [illegible]nd glancing into that building (73) and moved on.

Apparently something had interested Agent Colgan because on the next day, February 19, just after noon, he was again on the sidewalk outside 139-11 - 95th Avenue with Agent Dowd just behind him, and another agent, Pistone, was parked in a car nearby (11-12, 15, 17, 27-28). On this day he said he looked again at the open bay and loading platform and saw on the platform 5 to 8 cartons with labels and markings (to wit, a large red diamond, the letters "MIC" within it and "Franciscano, Brazil" and "Dunham") similar to those which were on the stolen goods (12, 16-20, 22, 27) but he had not seen the balance of the 633 cartons then (20). There was no truck in the bay (except a small coffee lunch truck out of the way of the general bay working area), and no truck pulled in during almost four hours thereafter (29, 127-128, 130); there was no activity surrounding the cartons; they were not being moved (80, 93, 109, 129). He did not think before entering of obtaining a search warrant (78, 124) even though the District Court was only about 20 to 40 minutes traveling time away (81), and there were no exigent circumstances showing likelihood that the suspected cartons would disappear (as conceded by the Government at 135). Nor did either agent feel any danger was present (80, 109, 127, 129).

Here we have the following diverse testimony. Agent Dowd, contrary to the foregoing open view testimony of Mr. Colgan, testified that he had no knowledge prior to approaching the building as to its contents nor did Mr. Colgan give him any information

as to the contents thereof (116) and further

> " * * * Mr. Colgan and myself approached and opened a door of 135-11 - 95th Avenue [sic] from the west by the door and peered into the warehouse." (117)

And then they found the cartons (117). (This discrepancy is analyzed under Point II.)

No warrant was sought or obtained.

Both thereupon entered the private building as per Mr. Colgan (28, 88) and went to the easterly side of the bay, climbed onto the loading platform and proceeded right past the cartons (34, A-11) to a glass enclosed office (28-29). The third agent had been earlier advised to alert agents on the team in the area of the discovery and to join them to assist (27-28).

Questioning of the defendant by Agent Colgan then ensued with Agent Dowd also present. They identified themselves and on inquiry the defendant said he was a tenant of the building, and Mr. Colgan advised him of the purpose of their visit (31). The agent asked the defendant if he would consent to a search of the premises, and he also testified that the defendant was advised of his right to refuse consent and to demand a search warrant. The defendant said he understood his constitutional right to demand a search warrant and it would not be necessary, and he consented to a search of the premises (31-32). Mr. Colgan had also said before such consent was given that a warrant would be obtained by him if consent were not given (104). The agent significantly stated that he thought that the defendant knew or

felt he did not have any other choice (107, 108).

As testified, Mr. Colgan proceeded to the cartons he said he had seen where he was able then for the first time to observe the number LB 040 as positive identification of the merchandise (32) and which he had not seen from the street (89). As a result, on inquiry by the agent if he had any more of the cartons, the defendant said "yes" and pointed to a rear section of the building; and Mr. Colgan then discovered what he had not seen before -- the balance of the 633 cartons (33).

Mr. Haimson was not placed under arrest until almost four hours later that afternoon (130).

EXCERPTS OF FINDINGS FROM DECISION BELOW

In the course of the memorandum decision dated August 26, 1976 which reviewed the facts, Judge Pratt made the following salient findings: That no contradictory testimony was presented (A-9); that nothing in the testimony of the F.B.I. agents was found to be contradictory or incredible (A-9); that the agents had not considered getting a search warrant, that they had no feeling of danger on entering the premises, and that there was no sign of activity indicating exigent circumstances or any likelihood that the cartons would be removed promptly (A-13); that the agents did have time to obtain a warrant; but there was no obligation to do so when the defendant consented to the search; that the defendant's consent was validly given (A-14).

POINT I

WHERE THERE IS TIME TO OBTAIN A SEARCH WARRANT, THERE BEING NO EXIGENT CIRCUMSTANCES, IT IS FOR THE COURT, NOT THE F.B.I. AGENT, TO DECIDE THE QUESTION OF PROBABLE CAUSE AND WHETHER A WARRANT SHOULD ISSUE AND A SEARCH MADE. THE INITIAL ENTRY INTO THE BUILDING AND THE SEARCH AND SEIZURE WITHOUT A WARRANT WERE VIOLATIVE OF THE FOURTH AMENDMENT AND NOT JUSTIFIED UNDER THE 'PLAIN VIEW" EXCEPTION.

Was the entry by the agents into the building in the first instance legal under the Fourth Amendment?[3]

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

If the Fourth Amendment is to have any real significance and is to act as a protective device between law enforcement officers and the private person, then basically in every instance a court should decide in the first place the question of whether

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3. Point I is based on the version of the entry furnished by Agent Colgan (viewing of some of the cartons from the sidewalk) rather than the version provided by Agent Dowd (opening of a door and then observing the cartons), disregarding the finding of the Trial Court that there was no contradictory testimony, which is dealt with in Point II. If it were the latter version, there could be no "plain view" from the sidewalk contention by the Government.

or not a search may be made. A warrantless search is per se unreasonable, Coolidge v. New Hampshire, 403 U.S. 443 (1971) and, hence, presumptively unconstitutional. By decisional authorities, there have been carved exceptions out of this fundamental principle, but that is exactly what they are -- exceptions, limited in scope and under particular factual backgrounds.

Warrantless searches are permitted as a practical measure, so as not to allow the Fourth Amendment to become a universal bar to all such searches, in those limited instances where to require a warrant would be unrealistic in the light of the need for immediate action. Hence, for example, the courts have held that a warrantless search may be made as an incident of a lawful arrest; or where a law enforcement officer is pursuing a criminal into a building, a search may take place; and again, a search may be upheld in the movable automobile cases; or provided enough facts are received from a reliable informant to support probable cause, together with in most cases the officer's personal knowledge, and the contraband sought will disappear if time is taken to obtain a warrant, a search may, in some instances, be undertaken; and finally, in certain situations, a search may take place under the "plain view" doctrine. (Excluded from this consideration are the statutory, regulatory searches. United States v. Biswell, 406 U.S. 311 (1972).) It is the factor of lack of time and the presence of exigent circumstances which

permit a court to overlook the basic need for a warrant and authorize the law enforcement officer to act on his own.

On the other hand, absent the foregoing ingredients, an F.B.I. agent is not a walking United States District Court and is not vested with the functions of a United States magistrate or judge. It is the fundamental historical purpose of the Fourth Amendment to place a barrier in the form of a neutral jurist between the unrestrained action of a law enforcement officer, however well-intentioned, and the private individual and his premises. In that way the Founding Fathers had hoped to prevent general invasions and searches which had plagued the colonies. Johnson v. United States, 333 U.S. 10 (1948); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); Chimel v. California, 395 U.S. 752, 761 (1969).

This Court in the oft-cited case of United States v. Paroutian, 299 F.2d 486 (2 Cir. 1962), noted that law enforcement officers had received information from Interpol and based thereon gained entry into an apartment accompanied by the agent of the building owner, where their attention was called to a new closet lining. The officers unsuccessfully sought to pry the same loose. Two days later they returned with a friend of the tenant and of the defendant, and took possession of certain evidence. In each instance they acted without a warrant. After the apartment became vacant two months later, with the owner's permission, they searched the closet and obtained the evidence to sustain the charges against

the defendant. This Court criticized the officers for not obtaining a warrant before their first entry and held that the first two searches were unlawful, and further that the third entry, although properly made, was tainted by the information obtained in the initial illegal entries. (The latter is further referred to in this brief under Point III.) The following is pertinent here from page 488:

> "It is admitted that no warrant was procured before the searches. Such a search can be justified only as incident to a lawful arrest or under exceptional circumstances which make it impractical to secure a warrant through orderly procedure. Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436. * * *
>
> At least several days must have elapsed between receipt of the Interpol letter and the search. There is no showing of any reason why the few hours necessary to secure a warrant could not be spared; the apartment, with its cache of heroin, went unmolested for two months thereafter. Here, the only permissible inference is that the agents were careless or feared they had not amassed sufficient evidence to support issuance of a warrant. These facts demonstrate the recurrent need to suppress logically relevant evidence if acquired unlawfully, even where it may mean that a criminal will go free. For in these circumstances the agents willfully or negligently ignored judicial admonitions, constantly reiterated, that each one of us, suspected criminal or no, is entitled to security in our persons, houses, papers, and effects until an impartial magistrate determines that the enforcement officers have probable cause to believe the law has been violated."

This need for application to a judicial officer for a search warrant was clearly stated in Baysden v. United States, 271 F.2d 325, 327, (Cir. 4, 1959):

> "The decisions of the courts in passing upon the Fourth Amendment and Rule 41 (Federal Rules of Criminal Procedure) hold that a federal civil officer charged with the responsibility and duty to detect crime may not undertake the search of a house or place of business upon his own authority, no matter how strong or reasonable the probability may be that the citizen is guilty of crime. The power to authorize a search is lodged in a judicial officer and the grounds for the issuance of the warrant must be submitted to his impartial judgment so that he may determine whether probable cause exists for the invasion of the property of the accused."

Further, the Supreme Court has made it clear that not only is a person protected in his residence against warrantless searches, Camara v. Municipal Court etc., 387 U.S. 523 (1967), but he is equally protected under the Fourth Amendment in his business or commercial property. See v. City of Seattle, 387 U.S. 541 (1967).

The Government below relied upon the "plain view" exception to the need for a search warrant, based on the viewing of the 5 to 8 cartons from the street. The Assistant United States Attorney's position on this point appears at 135-136:

> "We concede there are no exigent circumstances here * * * ."

> The Government's contention is merely that first of all these goods were in plain view from the street. They were also in a public area within the building itself, which is a business warehouse, a storage warehouse. And the agents as well as anyone else were free to walk into it. And the boxes, aside from being visible to the street, were visible as you walked in. And consequently, they were seizable at that time."

(He also argued there was consent to search -- obtained after the entry into the premises -- which is dealt with in Point III of this brief.)

Further at pp. 144-145, he argued:

> "And also location of the goods, and because of the access to the streets, and they were in plain view, these goods were seizable as contraband without a warrant and without consent. The agents could have merely seized them. They were in plain view."

First, it is noted that nowhere in the Trial Judge's memorandum (A-9 to A-16) did he find, as claimed by the Government, that the goods were in a public area within the building, or that the agents or anyone else were free to walk into it. Second, there was absolutely no evidence to substantiate the foregoing contentions.

There can be no serious dispute that neither in law nor in fact was the defendant's place of business one that was open to the public, such as a hotel lobby, public hall of a business building, restaurant or store, where limited entry may be in order. It was strictly private premises. The defendant conducted a private trucking business and incidental thereto, there was storage or warehousing space. It was not a public warehouse and no sign indicated that it was or that the public generally was invited to enter. Those persons who desired to do business with the defendant were invited to enter, but certainly not the F.B.I. The building structure itself indicated its private nature, with no outward indication that it was a public

promenade. There was a wall along the sidewalk with openings for access by a door for pedestrians, which was the proper means of entry for permitted persons on foot, or by means of an overhead door for trucks to reach the loading platform.

The loading platform, on which the visible cartons were placed, was definitely not an area to which members of the public were invited, and it was there that the agents went in the first instance having to cross the truck bay and then climb up from the lower truck pit (34, A-11). The signs on the front stated the nature of the occupancy. The fact that it had an opened truck door, as told by Mr. Colgan, when he arrived, did not transform it from a private place to a public place anymore than if the pedestrian's door were opened at the time. It still required a crossing into and an invasion of the four walls of a private property by the agents. More than that, Mr. Colgan said he could not see certain identifying markings from the street and first was positive of their identification after he stood right next to the cartons within the building (32, 89). It was just as private as if there were a plate glass window permitting people in the street to view that which was within but nevertheless not inviting them to enter. It is submitted that the above quoted contention by the Assistant United States Attorney confuses the ability to see with the right to search and seize.

As to the "plain view" exception, the case of Coolidge v. New Hampshire, 403 U.S. 443 (1971), supra, furnishes the

guidelines. In holding the "plain view" exception not applicable there and the search and seizure unconstitutional under the Fourth Amendment, the Court set forth the following ground rules, all of which must be met to validate a "plain view" search and seizure:

1. The law enforcement officer had a prior unrelated legal justification for being present within the premises where the plain view occurs, and the lawfulness of his presence must rest on something other than the plain view.

2. He comes upon the object inadvertently, that is, he was not looking for it in the first place.

3. There must be exigent circumstances, denying the officer time to obtain a search warrant.

4. It matters not that what is seen is contraband; a search warrant is still required.

5. Plain view without more does not justify the warrantless seizure no matter how strong the probable cause.

The Supreme Court there wrote at page 466:

> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure."

Further at pages 468-469, the following instructions appear:

> "The limits on the doctrine are implicit in the statement of its rationale. The first of these is that plain view alone is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.' Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. Taylor v. United States, 286 U. S. 1; Johnson v. United States, 333 U. S. 10; McDonald v. United States, 335 U. S. 451; Jones v. United States, 357 U. S. 493, 497-498; Chapman v. United States, 365 U. S. 610; Trupiano v. United States, 334 U. S. 699.
>
> The second limitation is that the discovery of evidence in plain view must be inadvertent."

And lastly, it was pertinently said in the footnote on page 471:

> "A long line of cases, of which those cited in the text, at n. 25, supra, are only a sample, make it clear beyond doubt that the mere fact that the police have legitimately obtained a plain view of a piece of incriminating evidence is not enough to justify a warrantless seizure."

At bar, the following is absolutely clear to show a total failure to meet the conditions set down in Coolidge:

1. The F.B.I. agents had no prior justification to invade the premises.

2. The search was not incidental to the arrest, which took place about four hours later (130).

3. There was nothing inadvertent about their being there or their finding the stolen goods. The agents were making

a search specifically for that which they found (7-11, 111, 114-115, A-10, A-13).

4. They had probable cause to obtain a search warrant, either by virtue of the information obtained from the confidential informant, if they could show reliability, or by virtue of their own observations.

5. And most importantly, there were absolutely no exigent circumstances and they had time to obtain a search warrant. Taylor v. United States, 286 U.S. 1 (1932). Besides the concession by the Government, as above quoted, the Trial Judge in his memorandum found:

> "Both agents agreed that they had not considered getting a search warrant, that they had no feeling of danger on entering the premises, and that there was no sign of activity indicating exigent circumstances or any likelihood that the cartons would be removed promptly. * * * " (A-13)

> "On this record, it seems clear that the agents did have time to obtain a warrant; * * * " (A-14)

To that can be added the fact that there were eight to ten F.B.I. agents in the area who were called to assist at the scene (8-9, 27-28), providing enough surveillance and guards who could intervene if someone commenced to remove the cartons, or if other exigent circumstances developed before the warrant arrived. United States v. Jeffers, 342 U.S. 48, 52 (1951).

For a case in point upholding the foregoing items, and where evidence of criminal activity was observed outside the enclosure, see Walker v. United States, 225 F. 2d 447 (5 Cir. 1955)

where the right to suppression was sustained and judgment was reversed.

The New York Court of Appeals, for which this Court has shown its regard in the past, had a most comparable case before it in People v. Spinelli, 35 N.Y.2d 77, 358 N.Y.S.2d 743 (1974). There the F.B.I. had received information about the hijacking of two trucks with distinctive markings. The agent received confidential information that the trucks were in the rear yard area of the defendant's business property. The next day the agent went to a "public" golf course adjoining, stood at a fence, observed the trucks with binoculars and saw the identifying markings. After four to five months,[4] based on information given by the agent, the local police also made observations of the trucks from the said golf course. A few days later, the agent, local police and state police went to the front door of the premises and arrested the defendant pursuant to a warrant for unlawful use of credit cards. Without a search warrant, the police then went to the rear of the premises and checked out the identifying number of one truck. Several hours later the police seized the trucks and removed them. The next day the defendant was arrested on a warrant charging him with unlawful possession of the stolen vehicles. He was indicted on that charge as to one

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4. Although there was greater time in Spinelli to obtain a search warrant than at bar, that is a matter of degree. It does not change the legal effect of the basic fact that in each instance there was time to secure a warrant.

of the trucks. A motion to suppress was made which the Court of Appeals sustained. Relying upon federal authorities, and notwithstanding the presence of the element of an arrest which preceded the search, the Court held that there was no fear that the trucks would be suddenly moved, that there was time to obtain a warrant, and one should have been obtained. It was stated at page 80:

> "It is well settled that a businessman's private commercial property is entitled to Fourth Amendment protections (see See v. City of Seattle, 387 U.S. 541, 543). * * * Under these circumstances, a search warrant should have been obtained before the truck in question was seized. (See Coolidge v. New Hampshire, 403 U.S. 443; Chimel v. California, 395 U.S. 752, 764, n. 9.)"

The opinion continues (pages 80-81):

> "Respondent initially asserts that no warrant was needed because the truck was seen in plain view. A person who leaves an article in plain view has no legitimate expectation of privacy with respect to that item (see Ker v. California, 374 U. S. 23, 43). But generally the mere fact that a law enforcement official has detected an item in 'plain view' does not mean he can conduct an unlimited search and seizure without a warrant. The Coolidge court spelled out two very rational caveats on warrantless plain view searches and seizures.
>
> First, the court noted that plain view alone is never enough to justify a warrantless search and seizure (Coolidge, supra, p. 468). And it makes no difference if the article seized is 'mere evidence', contraband or evidence of the crime or fruits of the crime. (Coolidge, p. 468; see, also, Warden v. Hayden, 387 U. S. 294.) The second requirement is that the object must have come into plain view inadvertently (Coolidge, supra, p. 466). If the 'discovery is anticipated' (p. 470) as in the case at bar, the warrantless

> search must fall. This requirement prevents law enforcement officials from circumventing constitutional requirements by waiting to effect a legitimate arrest when the defendant is near the incriminating evidence.
>
> In both the Coolidge case (Coolidge, supra, pp. 474, 464, n. 22) and the case at bar, the law enforcement officials had the requisite probable cause to obtain a search warrant. The viewing of the trucks could not be said to be inadvertent."

And finally the Court held (pages 81-82):

> "The crux then is that there was ample time for the law enforcement officials to secure a warrant in order to make this significant intrusion onto defendant's premises. One must be careful to distinguish between constraints on police conduct which limit effective police enforcement and those constraints which merely make effective police enforcement more burdensome. In the case at bar there was absolutely no justification--either relating to exigent circumstances or the nature of the search or seizure effected--for not obtaining a search warrant. The mere fact that it would be burdensome to obtain a warrant, standing alone, is never justification for not obtaining a search warrant (McDonald v. United States, 335 U. S. 451, 455; Coolidge, supra, pp. 479, 481)."

The Appellate Division majority opinion in the above Spinelli case (42 App. Div. 2d 64, 345 N.Y.S.2d 87 (1973)) contains all of the arguments made by the Government here, but the same was reversed by the Court of Appeals.

The absence of inadvertent discovery in the case at bar can be emphasized by the fact that Agent Colgan walked past the subject building on the day before, when, as he testified, he was facing a bright western sun, and turning his head to the right for one second, he glanced into the open truck bay, and saw

nothing but a person in a lighted area. Although he was acting as an F.B.I. agent investigating likely buildings for specific stolen goods, he testified that he "really didn't look at all." (20-21, 61-62, 70-71, 73). Can this be accepted in the face of the presumption that a government employee is presumed to do his duty; that an F.B.I. agent's duty is to observe and observe carefully; and that one is presumed to see objects in the unobstructed direction in which he looks? Further, since he said he kept on walking (21, 70), even if he looked for only one second, he had to look after he passed the easterly edge of the open truck bay and that would cause his view to be along the easterly portion of the straight loading platform on which the visible cartons were placed (Gov't. Exhibit 1D, Photograph).[2] Is it a question of credibility for the lower court only or can this Court in this non-jury matter fairly infer that Agent Colgan saw something on the 18th which prompted his visit on the 19th?

In the following cases, notwithstanding that the evidence was detected or observed from a point outside the premises, the investigation, search and seizure which followed without a warrant were held unconstitutional:

Johnson v. United States, 333 U.S. 10 (1948), supra, (smell of opium in hall of hotel, the occupant willingly opening the door to her room and admitting the officers, and notwithstanding an immediate arrest; no suspect fleeing, permanent premises, no evidence of contraband being removed or destroyed).

Trupiano v. United States, 334 U.S. 699 (1948), (odor of fermenting mash, sound of a motor, and, "Looking through an open door into a dimly lighted interior he could see a still column, a boiler and a gasoline pump in operation" (702). An arrest followed and the agent seized the illicit distillery and looking further, he observed some large cans with alcohol and some vats. Another agent testified "he could see several of these cans through the open door before he entered; * * *" (702). There was time to get a warrant).

McDonald v. United States, 335 U.S. 451 (1948) (after gaining admission to a rooming house, officer in hallway observed a lottery through a transom of a room, after hearing an adding machine being used, and was allowed into the room by accused and arrested him).

Taylor v. United States, 286 U.S. 1 (1932), supra, (odor of whiskey from a garage and observation of 122 cases therein through an opening in wall, followed by an arrest; there was opportunity to obtain a search warrant; agents could have watched in the interim).

Beyond the five to eight cartons which Mr. Colgan said he observed, the agents did not see the balance of the cartons (to wit, 625 to 628 out of 633 cartons) from the street. They first learned of their whereabouts after questioning the defendant, who pointed to the right rear section of the building. Then for the "first time" Mr. Colgan saw the remaining cartons (33,

A-12). The Assistant United States Attorney contended that since the agents had the right to take the cartons which they could see from the street, (which this Point disputes), they could also under the plain view doctrine proceed further and further into the building and seize all other stolen goods they could find (145-147). The Trial Judge was doubtful of that interpretation (145-147).

The foregoing dangerous legal proposition would open the door to limitless searches, step by step, which the Fourth Amendment forbids. The reliance by said Attorney on Chimel v. California, 395 U.S. 752 (1969), supra, (at 146) is misplaced. Chimel held as an incident of a lawful arrest the officer could seize items on the person of the arrestee and within his immediate control to prevent destruction of evidence or use of weapons. It does not purport to rule on searches not related to an arrest. See Coolidge v. New Hampshire, 403 U.S. 443 (1971), supra, at 465, and at 466, where it was said in point:

> "Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."

The "plain view" doctrine did not authorize the initial warrantless entry of the agents into the building nor the search and seizure which followed with respect to the cartons on the loading platform nor with respect to the cartons in the right rear of the building.

Here the "uninvited ear", Katz v. United States, 389 U.S. 347 (1967) is now joined by the "grasping hand", in violation of the Fourth Amendment.

The burden of establishing the validity of the warrantless search and seizure is on the Government and it has not been sustained. United States v. Jeffers, 342 U.S. 48, 51 (1951), supra.

POINT II

IT WAS CLEARLY ERRONEOUS FOR THE TRIAL JUDGE TO FIND THERE WAS NO CONTRADICTORY TESTIMONY ON THE ESSENTIAL ISSUE OF THE ENTRY INTO THE PRIVATE BUILDING IN THE FACE OF THE DIVERSE TESTIMONY GIVEN BY EACH F.B.I. AGENT ON THAT SUBJECT.

While Agent Colgan said that he stood on the street and looked through an open bay door and could see some markings on a few cartons which told him he was on the right track (12), Agent Dowd on his direct examination gave a completely different story of how they entered:

> "A I went with Mr. Colgan and Mr. Pistone to search the area to the east of the Van Wyck Expressway off Atlantic Avenue.
>
> Q And did there come a time you approached 135-11 [sic] 95th Avenue? A Yes.
>
> Q Prior to approaching that building do you have any knowledge as to the contents of that building? A No, I did not.
>
> Q Had you received any information from Mr. Colgan as to the contents of that building? A No, I did not.

> Q And what occurred when you got there, sir? A I believe Mr. Pistone stayed in the car or immediately outside of it and Mr. Colgan and myself approached and opened a door of 135-11 [sic] 95th Avenue from the west by the door and peered into the warehouse.
>
> Q And were any observations made by yourself at that time? A Well, Mr. Colgan was in front of me and I was just to the rear of him and he mentioned that those are the cartons. * * *
>
> Q What did you do when Mr. Colgan told you that those are the cartons at that particular premises? A I was surprised. He told me to tell Pistone to call the other agents back to this location, which I did.
>
> Q Did you have occasion then to enter that premises? A Yes, we did, shortly thereafter." (116-117) (Emphasis supplied.)

This is not a case where the Trial Judge decided a question of credibility between opposing witnesses which this Court would refuse to review under the standard rule of non-reviewability of such issue.

In such instance the Trial Judge would have said: "I have heard and seen Agent Colgan and Agent Dowd. I believe Colgan. I don't believe Dowd." But Judge Pratt did not say that. Rather he stated:

> "No contradictory testimony was presented. * * * Nothing in the testimony of the witnesses was found to be contradictory or incredible." (A-9)

The foregoing means that the Trial Judge overlooked entirely the testimony of Mr. Dowd and, it is submitted, that is plain and clear error. Jackson v. United States, 353 F.2d 862 (D.C. Cir. 1965). The error affects the major issue of the legality of the

entry and the substantial rights of the defendant, and constitutes plain error. Herzog v. United States, 226 F.2d 561 (9 Cir. 1955), opinion adhered to 235 F.2d 664 (1956), cert. den. 352 U.S. 844 (1956); Federal Rules of Criminal Procedure, Rule 52(b).

In addition, when one considers how Mr. Colgan testified, the definite impression can be gained that entry was made directly. In the testimony of Mr. Colgan, the following interesting slip of the tongue occurred on direct examination:

> "Q What happened when you arrived there on the 19th? A On the 19th we parked our vehicle and proceeded towards an opened bay door of that location, 139-11 95th Avenue.
>
> As soon as I entered -- I actually did not enter. As soon as I came upon the opening actually to enter my eyes fell upon cartons that bore labels and markings that I knew to be from the stolen load." (12)

Mr. Colgan also testified:

> "Q How did you enter the building, Agent Colgan? A To the best of my recollection there is only one way to this building and that is through the open bay door." (28)

Yet, Government Exhibits 1A and 1C (Photographs)[2] clearly show the door on the left (west) side for persons who wish to enter without having to descend into the truck pit and then climb up onto the loading platform, which ties in with Mr. Dowd's testimony. This raises the query: Was the bay door open? If one considers as well Mr. Colgan's testimony on redirect and also on direct, where he said they had gone into two and probably three buildings before reaching the subject premises and conducted searches with consent of the owners and proprietors (111, 8-9),

it is fair to infer that each of those other buildings did not have open fronts and required entry through closed doors; and that since the agents approached the subject premises from the west, they came upon the above door first and entered as they had other buildings previously.

If we add to the foregoing the fact that the view of Mr. Colgan was into a darkened area with little general lighting (Gov't. Exhibits 1A, 1B and 1C)[2]; that he testified on direct examination that the noon sunlight outside made it for him not totally bright on the inside (19, 124-125); that some of the identifying markings were not very large, e.g. "MIC", that the name "Dunham" was light in print (Gov't. Exhibit 1K)[2]; that he said he did not observe the marking "LB 040" from the street (32, 22, 90), [the Trial Judge erroneously found that he could read those letters and numbers from the street, A-11]; and that his view was from a distance of 25 to 35 feet (90); it is not merely a question of non-reviewable credibility but rather of physical ability to actually see everything as stated. In the latter instance, credibility is reviewable because of scientific or physical refutation. Even in the courtroom, from about 18 to 20 feet, Mr. Colgan could barely read only part of the smaller identifying markings (90-91).

Thus it was appropriately said in Jackson v. United States, 353 F.2d 862 (D.C. Cir. 1965), supra, a suppression hearing case involving inconsistencies in a police officer's

testimony, at pages 865-866:

> "It remains our responsibility, however, to review fact findings and to reject them when we are firmly convinced they are wrong, when the probability of error is too great to tolerate. This involves, in some contexts at least, an evaluation of the credibility of the witness or witnesses upon whose testimony the finding is based."

And at page 867:

> "In some cases police testimony, like other testimony, will simply be too weak and too incredible, under the circumstances, to accept. * * * Our conviction that Bello's [police officer] testimony should have been discredited, however, is primarily based on the fact that it contains internal contradictions and is contrary to human experience. The doctrine that appellate courts must reverse findings based upon 'inherently incredible' testimony has long been accepted in this jurisdiction. Sometimes, it is possible to disprove testimony as a matter of logic by the uncontradicted facts or by scientific evidence. E.g., The Telephone Cases (Dolbear v. American Bell Tel. Co.), 126 U.S. 1, 567, 8 S.Ct. 778, 31 L.Ed. 863 (1888). But the doctrine of inherent incredibility does not require such positive proof. It is enough to invoke the doctrine if the person whose testimony is under scrutiny made allegations which seem highly questionable in the light of common experience and knowledge, or behaved in a manner strongly at variance with the way in which we would normally expect a similarly situated person to behave."

It is submitted that the testimony in this case at bar is not the type of proof necessary to sustain the burden resting on the Government to justify the warrantless search.

The finding of "plain view" by the Trial Judge based on the testimony of "[b]oth agents" (A-14) actually rested on Mr. Colgan's testimony and failed to notice the completely

contrary testimony of Mr. Dowd. This overlooking of the contradictory testimony given by each agent on the essential issue of the entry into the building was clearly erroneous.

POINT III

(A) RESORT BY GOVERNMENT AGENTS AS A MATTER OF ROUTINE TO "CONSENT SEARCHES" VIOLATES THE FOURTH AMENDMENT.

(B) THERE WAS NO CONSENT GIVEN TO THE F.B.I. AGENTS TO ENTER AND SEARCH PRIOR TO THEIR INITIAL INTRUSION INTO THE PRIVATE BUILDING. THE CONSENT OBTAINED THEREAFTER TO MAKE A FURTHER SEARCH AND ANY STATEMENTS MADE WERE TAINTED BY THE INITIAL ILLEGAL ENTRY.

(C) THE CONSENT WAS THE RESULT OF COERCION UNDER THE CIRCUMSTANCES AS SHOWN BY THE TESTIMONY.

The Assistant United States Attorney in the lower court argued that there was a consent to search and there is no need for a search warrant in that event; that there is no Fourth Amendment violation where an individual permits the police to search (136). With the foregoing general proposition there can be no quarrel.

The defendant's attorney below contended that the primary objective of the F.B.I. agents should have been to secure a search warrant; that there was time to obtain one; that the agents did not consider getting one; that they should not be permitted to rely on searches by consent as a regular procedure. Further, he argued that the consent given was not a valid, intelligent,

informed, uncoerced one (137-141).

The Trial Judge noted:

> "THE COURT: The Government concedes there are no exigent circumstances here. He could have ten weeks to get a warrant and if he goes and asks for consent and gets it, isn't it valid?" (137)

The Trial Judge asked at 143:

> "THE COURT: Does either of the gentlemen know of any cases on the question of whether there are any preconditions to, or time restrictions on a consent search?
>
> MR. COCORAN: I don't think it's ever been litigated, your Honor?"

The Trial Judge in his memorandum, as stated earlier in this brief, held that although it was clear that the agents did have time to obtain a warrant, they had no obligation to do so when the defendant consented to the search; and that such consent was validly given after he was informed of his rights (A-14).

(A) Resort by Government agents as a matter of routine to "Consent Searches" violates the Fourth Amendment.

With the foregoing in mind, it is clear from the testimony that the agents "conducted what we call just requests for consent searches in a number of buildings in the general area of Atlantic Avenue and the Van Wyck Expressway." (8, 9, 31, 103-104, 111, 115, A-10). At no time before interviewing the defendant did the agents ever consider getting a search warrant (78-79, 131-132, A-13).

Although the question appears to be untested, especially in appellate courts, it would seem that the use of "consent searches" as a matter of routine procedure would violate the spirit of the Fourth Amendment. A consent to a search is not an exception which courts have written into the Fourth Amendment, as stated by the Government attorney below at 143. If it were an exception, then like all such exceptions it would be given a restricted and limited use so as not to permit it to become a means of general uncontrolled searches which are prohibited. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971), supra.

Rather, a consent to a search is a waiver of one's constitutional rights and protections and is, accordingly, subjected to careful judicial scrutiny to see to it that the waiver was a voluntary, knowing act. The Government bears a heavy burden of proof on that score. Bumper v. North Carolina, 391 U.S. 543 (1968). In view of the established desire of the courts to be certain that consents are not the result of anything other than the voluntary, intelligent act of the person waiving, it follows that the routine, generalized use of that procedure to effect a search would produce more and more cases requiring judicial review. It would also eventually tend to void the Fourth Amendment altogether and become the rule. This result should not be encouraged.

It is suggested that consents should not be permitted as a regular procedure for making a search. It is further

suggested that consents should be used on an individualized basis where there is no wholesale invasion of building after building in an area, as at bar. A clear distinction should be drawn between investigations and observations, which are obviously permitted and should be, and a search and seizure.

Since the minds of the agents here were not directed towards a warrant at all, which should have been their primary source of right guided by an impartial judicial authorization, they were circumventing the Constitution, perhaps to avoid the burden of seeking a warrant. But self-help is not an excusable alternative. McDonald v. United States, 335 U.S. 451, 455 (1948), supra; People v. Spinelli, 35 N.Y.2d 77, 81-82 (1974), supra.

(B) There was no consent given to the F.B.I. agents to enter and search prior to their initial intrusion into the private building. The consent obtained thereafter to make a further search and any statements made were tainted by the initial illegal entry.

There was no testimony that the F.B.I. agents had received permission in the first instance from anyone to enter the private business premises occupied by the defendant and to make a search therein. They certainly were not there for a purpose connected with the business. It should be borne in mind that their means of entry took them onto the loading platform right past the few cartons they had seen, as Mr. Colgan said, from the street (34, A-11, Gov't. Exhibit 1-D)[2]. It is not far-fetched to assume they were looking at the cartons close by and could now

make out some of the smaller identifying marks not previously visible. This constituted a search before they even reached the defendant.

As shown in Point I, their incursion into the building was illegal not being supported by a warrant or the "plain view" doctrine. Once the agents had gained access to the inside of the building and approached the defendant, and said they saw some of the stolen cartons (31), the defendant acted as he did and gave consent to a further search resulting in discovery of the balance of the cartons based on their illegal presence on the premises.

Implicit in the presence of the agents on the premises was their legal right to be there. That impression was conveyed to the defendant as it would be to any person. They did not say, "We have no right to be in your place of business, but want your consent to search it." The absence of any affirmative statement does not make the omission any less impressive on a person who is told that the agents see stolen merchandise at hand. Their position as federal agents reinforced the lawfulness of their entry and the search in passing next to the visible incriminating cartons.

The consent rested obviously on the fait accompli and had no independent origin. The consent and any statements made were tainted by the initial illegal entry and the sequence of events preceding the consent.

In Bumper v. North Carolina, 391 U.S. 543 (1968), supra, the law officers gained entrance by referring to a warrant which turned out to be not valid. This was the same as if there were no warrant. The householder there gave consent because she was told of a void warrant; and the consent was held ineffective because she was led to believe the officers had a right to be there. Here, even though no void warrant is involved, the principle is the same. Where a person is led to believe that the law enforcement officer has a legal right to be present and he does not, the consent evoked is tainted and not voluntary. It is not a fair distinction that in one instance a paper is referred to while in another physical presence serves the same purpose and has the same effect.

Again referring to Johnson v. United States, 333 U.S. 10 (1948), supra, it was held at page 13:

> "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right. Cf. Amos v. United States, 255 U.S. 313."

And at pages 16-17:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion."

In United States v. Paroutian, 299 F.2d 486, 488-489 (2 Cir. 1962) supra, it was written:

> "The purpose of the rule against admission of illegally seized evidence is the protection of the right to privacy; by quarantining evidence gathered in this manner it is hoped that the zeal of enforcement agencies for such methods of procuring evidence will be curbed. '[T]here is but one alternative to the rule of exclusion. That is no sanction at all.' Murphy, J., dissenting in Wolf v. People of the State of Colorado, 338 U.S. 25, 41, 69 S.Ct. 1359, 93 L.Ed. 1782. Consistent with this broad purpose the rule extends beyond evidence directly seized in an unlawful search, to prescribe use of all evidence obtained as an indirect result of such illegal activity -- the 'fruit of the poisonous tree'. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319. See Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; United States v. Coplon, 2 Cir., 185 F.2d 629, 28 A.L.R. 2d 1041, certiorari denied 342 U.S. 920, 72 S.Ct. 362, 96 L.Ed. 688.
>
> An unlawful search taints all evidence obtained at the search or through leads uncovered by the search."

(C) The consent was the result of coercion under the circumstances as shown by the testimony.

The testimony shows that the consent was not truly voluntary, and did not reflect an intelligent and informed choice between alternatives.

After the agent identified himself and the purpose of his presence based on his observation of a quantity of cartons that bore markings, which had been stolen in a truck hijacking, he asked for the defendant's consent to a search. He also advised the defendant that he did not have to consent, but because of his constitutional rights, he could demand a search warrant; that the defendant said he understood his rights, that a warrant

would not be necessary and that he would consent to a search (31-32). The agent said:

> "Before Mr. Haimson even gave me a yes or no answer on my request for a consent search, I immediately advised him he had a constitutional right to demand a search warrant for these premises and that would be obtained by me." (104)

This Court reached the conclusion in United States v. Faruolo, 506 F.2d 490 (2 Cir. 1974) that the above state of facts did not make the consent coerced. It was held that the statement by the agent that he would obtain a warrant was not sufficient there to show that the consent was other than voluntary. In that case the agents saw the defendant in the act of unloading stolen goods from a truck into his house; they entered a rear yard (open space) and obtained the defendant's consent to search his house. There was a highly critical opinion concurring solely because of precedent. It was pointed out by Judge Newman that the agent gave the impression that a warrant would be issued without stating that it was discretionary with the Court, a neutral body; and that he would, except for precedent, have found the consent not voluntary.

At bar, there are present the following additional ingredients missing from Faruolo to show that the consent was not voluntary. First, it was brought out specifically on cross-examination in the testimony that the agent did not tell the defendant of the procedure he would have to follow to get a search warrant; that he would have to go to a magistrate, make out an

affidavit, and give some testimony as to the probability of a crime and the need for a search (104). The agent further testified that defendant, as quoted, said:

> "A * * * 'A search warrant will not be necessary. You look around and I will show you around.'
>
> Q He said it's not necessary, look around? A His words were that a search warrant wasn't necessary.
>
> Q Look around? A Something to that effect.
>
> Q Right? A Yes." (105-106)

After questioning on the impression the agent received when the defendant gave his consent, the Trial Judge followed it up and the answer of the agent reveals the coerced nature of the consent:

> "THE COURT: What did you think it was?
>
> THE WITNESS: I think we [sic] knew he didn't have any other chance [sic], he could demand a search warrant, but I think he impressed me as a fairly intelligent man and he just realized, 'I might as well let them search.'" (107) (Emphasis supplied.)

The word "we" in the transcript probably should be "he" and the word "chance" probably should be "choice". Whether in the original form or in the corrected form, it clearly establishes the fact that the agent believed that the defendant really was forced to say "yes" to the request for a consent search.

In a practical general sense, a defendant, after being told that the agents have already seen the stolen goods and identified them, has little voluntary room left. If he refuses consent, he says to himself: "They'll think I'm guilty." And

if he gives consent, he says to himself: "They'll hang me." So, in that situation, what type of free choice is there really? It is a choice between Scylla and Charybdis. And when there is added the statement by the agent that if consent is refused, he would obtain a warrant, giving the impression that all one has to do is tear off a legal form and get the magistrate to rubber-stamp it, the so-called freedom of choice dwindles to zero. Further, the presence of two F.B.I. agents does not enlarge the field of choice, especially if their presence is illegal. True the agents did not use any strong-arm methods but duress is a subtle thing under such circumstances. The foregoing is a fair example of submission to superior authority negating the spoken words of acquiescence.

In the light of the firmly established rule that when the Government relies on consent to justify a search, it bears a heavy burden of proof to sustain its validity, Bumper v. North Carolina, 391 U.S. 543 (1968), supra, it is submitted that the burden has not been carried here for consent must be unequivocal and specific. Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

CONCLUSION

1. The order denying the motion to suppress should be reversed and the motion should be granted.

2. The judgment appealed from should be reversed or vacated.

3. The information should be dismissed, since it rests

on the evidence sought to be suppressed.

4. If the above reliefs are not granted, there should be a remand for a hearing to consider the conflict in the testimony of the agents and any other relevant evidence.

Respectfully submitted,

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